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IN THE

Supreme Court of The United States

October Term, 1963

No. 434

FRANK BLOCH, et al.,

Petitioners,

v.

MARIE LOUISE BRILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Frank Bloch, David Tonkin, Corrado J. De Santis, Angela De Santis, Jerome D. Kass, Lita A. Kass, Carl H. Kline, and Edyth R. Levy, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 6, 1963.

OPINIONS BELOW

The report of the master in chancery (R. 64-83)[1] and the decree of the United States District Court for the Northern

[1] Page references to the Record are to the appendix filed in the Court of Appeals, which appendix constitutes the Appendix Record herein. Inasmuch as nine additional copies of the Record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21 (4), the report of the master and the decree of the district court are not appended to this petition.

District of Illinois, Eastern Division (R. 99-103) are unreported. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, pp. 10-18 *infra*, is reported at 318 F.2d 176.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1963 (Appendix B, p. 19 *infra*). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether, as a matter of California law, a transaction by which a defeasibly vested remainder interest in a trust is sold must be treated as a usurious loan by the purchaser if the latter obtains insurance on the life of the vendor in an amount at least equal to the amount paid for the interest, and if the margin between the value of the property transferred and the sum paid for it exceeds the maximum interest rate under the usury laws?

2. Whether, under Illinois conflict of laws principles, the Illinois or the California maximum rate of interest is applicable to assignments executed in California of an interest in a trust corpus located in Illinois?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions involved are paragraphs 4, 6 and 8 of Chapter 74 of the Revised Statutes of Illinois, and Article 20, Section 22, of the California Constitution. They are printed in Appendix C hereto, pp. 20-22 *infra*.

STATEMENT OF THE CASE

Jurisdiction of the district court in this case is based upon diversity of citizenship. In 1943, a complaint was filed in the district court to construe the will of Otto Young with respect to a testamentary trust created under the will. The district court assumed jurisdiction on the basis of diversity of citizenship, and since that time has retained continuing jurisdiction over the administration and liquidation of the trust estate. See *De Korwin* v. *The First National Bank of Chicago*, 267 F.2d 337 (7th Cir. 1959), *cert. denied*, 361 U.S. 931 (1960).

The will of Otto Young established a trust which was to terminate upon the death of the testator's last surviving daughter, whereupon the corpus of the trust, which consisted of real and personal property in Illinois and was administered in that state, was to be divided equally among the testator's grandchildren then living and the surviving issue of any deceased grandchild, *per stirpes* (R. 4-7). The interest of each grandchild in the trust corpus, as previously held by the district court, was a vested remainder, to the extent of a 1/18th undivided share, subject to divestment if the grandchild should die before the termination of the trust leaving issue surviving. See *De Korwin* v. *The First National Bank of Chicago*, 84 F. Supp. 918 (N.D. Ill. 1949), *aff'd on this point*, 179 F.2d 347 (7th Cir. 1949).

The last surviving child of the testator was respondent's mother, Marie Julia Pratt, who was born December 8, 1877, and who died August 17, 1956 (R. 217; 250). Beginning in November, 1949, and continuing through June, 1955, respondent made a series of assignments of portions of her remainder interest (R. 122-40). Among these assignments were two, referred to in this proceeding as MAR-B and MAR-C, which were made on December 29, 1949 to Leonard

P. Levy (R. 125). MAR-B and C, executed in California, where respondent then resided, purported in terms to be outright sales conveying portions of respondent's defeasible remainder to the extent of $250,000 and $100,000, respectively (R. 108-21; 314; 319). Respondent was paid $75,000 for the two assignments (R. 209). Respondent undertook no personal obligation to pay or repay any sum to Levy, and because of the nature of the interest conveyed, nothing would be received by Levy or any subsequent transferee in the event that respondent should predecease the life tenant (R. 108-21).

In connection with the transaction respondent assigned to Levy certain insurance policies on her life in the amount of $175,000 (R. 253). Annual premiums on the policies were approximately $4,400 (R. 209-10). There was some evidence indicating that the first premium on a portion of this insurance, in the amount of approximately $2,000, was paid by respondent (R. 213; 323-6). There is no evidence that any other premium payments were made by respondent.

Levy subsequently subassigned his entire interest in the MAR-B and MAR-C assignments (which were treated as an entity for this purpose) to other persons, including petitioners, each of whom thus claims portions of respondent's remainder interest (R. 125-30).[2]

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[2] The face value of the subassignments held by petitioners is as follows:

Frank Bloch	$ 2,500.00
David Tonkin	2,500.00
Corrado J. and Angela De Santis	15,000.00
Jerome D. Kass	5,000.00
Lita A. Kass	5,000.00
Carl H. Kline	10,000.00
Edyth R. Levy	28,500.00

In the course of proceedings before the district court, a partial settlement agreement was entered into between respondent and petitioners and approved by the district court whereby each petitioner was paid on account a sum equal to 42½% of the amount of his claim, without prejudice to his right to pursue his demand that he be paid in full (R. 57-61).

Shortly after August 17, 1956, when the trust terminated with the death of Mrs. Pratt, the trustees petitioned the district court for a determination of the validity and effect of the various assignments made by respondent (R. 9-12). Respondent thereafter filed an answer alleging that the assignment transactions were invalid for the reason, *inter alia*, that they were in reality loans and as such were usurious (R. 13-16).[3]

The claims of petitioners, and other subassignees under MAR-BC, were referred to a master in chancery for a hearing (R.47). The master filed a report holding the assignments invalid (R. 64-83), and his report was confirmed by decree of the district court (R. 99-103). Upon appeal by petitioners, the Court of Appeals affirmed.

While holding that petitioners could not recover under the assignments according to their terms, the Court of Appeals recognized that petitioners would nevertheless be entitled to recover the amounts paid by them for their subassignments. It concluded, however, that such recovery had been substantially satisfied by the partial payments already made under the prior decree of the district court.

REASONS FOR GRANTING THE WRIT

In characterizing the MAR-BC assignment transactions as usurious loans the Court of Appeals has decided an important question of state law in a way in conflict with applicable state law.

The decision of the Court of Appeals that these transactions must be regarded as loans is predicated on the proposition that by virtue of the insurance on respondent's

[3] Respondent subsequently advanced the additional claim that the MAR-BC assignments were ineffective because their execution had been procured by fraudulent misrepresentations on the part of Levy (R. 74-5). The master's report sustained this claim, and was confirmed by the district court on this point. The Court of Appeals, however, did not pass on the fraud issue.

life Levy was assured of the recovery, in any event, of the amount paid by him to respondent, and that where the sum advanced is not put at hazard, the transaction is necessarily a loan. The basis for the further conclusion that the transactions, if loans, are usurious is not disclosed in the opinion below. The theory pressed by respondent before the master, however, and substantially adopted in the master's report, proceeds by comparing the net investment made by Levy as calculated by respondent's witnesses (the amount paid appellee, plus insurance premiums and other initial expenses, less an assumed cash surrender on the policies) and the anticipated return of $350,000 to be received if the remainder interest conveyed is not divested. If, as the testimony showed, the life tenant, Mrs. Pratt, had a statistical life expectancy of 9.41 years when the assignments were made, and if in fact she should die at the end of that period, then the difference between anticipated return and the net investment would represent a rate of interest per annum upon the investment exceeding the maximum rate permitted by either Illinois or California (R. 78-9).[4]

This approach to the transaction resembles that employed by the court below in an earlier decision invalidating certain assignments made by respondent's brother, Graveraet Kaufman, of portions of his remainder interest in the trust. *De Korwin* v. *The First National Bank of Chicago*, 275 F.2d 755 (7th Cir. 1960), *cert. denied*, 364 U.S. 824 (1960). That case, however, turned on New York law, which was treated as governing the validity of those assignments. In effect, the court below applies the New York rule to the case at hand, in view of its holding that the New York decisions embody common law principles and that the latter form the rule of decision in California.

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[4] The maximum permitted under Illinois law is 7% (Ill. Rev. Stat. 1961, Chap. 74, paras. 4, 6, 8). The maximum rate in California is 10% (West's California Constitution, Art. 20, Sec. 22). See Appendix C, pp. 20-22 *infra*.

For the following reasons, however, the decision below conflicts with California law:

1. Under California law vested remainder interests, though defeasible, are freely alienable and capable of being sold. *Sinclair* v. *Crabtree*, 211 Cal. 524, 296 Pac. 79 (1931). If, as the court below held, the securing of insurance in connection with the purchase of a contingent or defeasible remainder precludes an effective sale, by the same token no sale of an indefeasibly vested remainder could be made. Furthermore, with respect to defeasible interests, since the purchaser is unlikely to be willing to assume the risk of losing his investment, the principle adopted by this decision would tend to make such interests unmerchantable.

2. Under California law it is not sufficient to establish usury that an amount in excess of the legal rate will be received by the lender. That excess must also be exacted from the borrower. The point is demonstrated by the California decisions involving the purchase of the obligations of a third party at a discount, see *Refinance Corp.* v. *Northern Lumber Sales, Inc.*, 163 Cal. App. 2d 73, 329 P.2d 109 (1958), and it is the clear holding of *Martyn* v. *Leslie*, 137 Cal. App. 2d 41, 290 P.2d 58 (1955), where the lenders were guaranteed the return of an amount exceeding legal interest, but from persons other than the borrowers. In rejecting a claim of usury, the California court stated, following the quotation cited by the Court of Appeals below:

> "While it is apparent from the evidence, despite the findings of the trial court to the contrary, that defendants would not have loaned the $35,500 [27,500] to the plaintiffs, or have purchased the 15 per cent interest, unless they could protect themselves not only against loss of the money loaned and their investment, but also against the loss of the expected capital gain, this does not establish, as a matter of law, the exaction of anything from the plaintiffs other than the interest

> that they expressly promised to pay. *The fact that the defendants, through contracts with third persons, insured themselves against loss and insured themselves a profit over and above the rate of interest which they would have been entitled to receive had the transaction in fact been that of a loan, does not establish usury.*" 137 Cal. App. 2d at 55, 290 P.2d at 66 (emphasis supplied)

The comment of the court below that the assignments would not have been consummated by Levy without the insurance thus does not serve to distinguish this case from *Martyn*. The "exaction" required to constitute usury is not the act of requiring insurance, but the exaction from the borrower of the sum of money constituting the excessive interest.

3. Under California law the mere fact that the return of principal is assured is not sufficient to make a conceded loan usurious. The test is whether neither the principal nor legal interest is put in hazard. *Schiff* v. *Pruitt*, 144 Cal. App. 2d 493, 499, 301 P.2d 446, 450 (1946). *A fortiori*, the purchaser's protection of the amount advanced, by insurance or otherwise, does not convert what is otherwise a sale into a loan.

In the present case there was no certainty that any sum greater than the $175,000 of insurance proceeds would ever be received by the purchaser or his subassignees, since the respondent might predecease the life tenant. In that event, whether that sum would exceed Levy's investment plus legal interest would depend upon the period of time which elapsed. Thus, for a nine-year period the $75,000 paid for the assignments plus interest at the California rate of 10%, together with insurance premiums at $4,400 a year, would come to $182,100; for ten years it would be $194,000.

The Court of Appeals, in holding that the maximum interest rate of Illinois was applicable to this transaction,

has also failed to follow the governing conflict of laws principles of Illinois. Since the assignments were executed in California, not only the question of their validity and nature, but the applicable maximum rate of interest is controlled by California law, notwithstanding that the security for the loan, which is how the court characterizes the property covered by the assignments, is in Illinois. *Walker* v. *Lovitt*, 250 Ill. 543, 95 N.E. 631 (1911). The court below cites *George* v. *Haas*, 311 Ill. 382, 143 N.E. 54 (1924), in which a note, usurious in Illinois, where it was executed, was held enforceable because it was not usurious under the law of the place where it was payable. In the converse situation, however, where a contract is valid where made, but invalid in the place of performance, the policy of Illinois is to uphold the contract. *Reighley* v. *Continental Illinois Bank*, 390 Ill. 242, 247, 61 N.E. 2d 29, 32 (1945); *Walker* v. *Lovitt*, 250 Ill. 543, 549, 95 N.E. 631, 633 (1911).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

In the

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13992

SEPTEMBER TERM, 1962 — APRIL SESSION, 1963

MARGARET DEKORWIN, *etc.*, *Plaintiff*,
v.
THE FIRST NATIONAL BANK OF CHICAGO, etc., et al., *Defendants*,

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee, etc., *Petitioner*,
v.
MARIE LOUISE BRILL, *Respondent-Appellee*,
and
FRANK BLOCH, et al., *Respondents-Appellants*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 6, 1963

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Frank Bloch, David Tonkin, Corrado J. DeSantis, Angela DeSantis, Jerome D. Kass, Lita A. Kass, Carl H. Kline and Edyth R. Levy, respondents, have appealed from a decree of the district

court, entered September 26, 1962. The court ordered that, there being no reason for delay, the decree be entered as a final judgment.

The court's decree was based upon the report of a master in chancery, which included findings of fact and conclusions of law.

This appeal concerns the validity and the nature of two assignments, made by Marie Louise Brill (then known as Marie Louise Tonella), of Santa Monica, California, appellee, on December 29, 1949 to Leonard P. Levy, hereinafter referred to as Levy, of Philadelphia, Pennsylvania, of parts of her 1/18th share of the right, title and interest in and to the income and principal of the estate of Otto Young, deceased,[1] payable at the death of Marie Julia Pratt out of the principal of the trust created by the will and codicil of said Otto Young, to the extent of $250,000 as to exhibit MAR-B and $100,000 as to exhibit MAR-C. Both assignments were executed by Brill in Santa Monica, California.

Each respondent claims a portion of the interest transferred under these assignments, by virtue of subassignments made to them by Levy.

From the evidence heard, the master in chancery determined that Brill's 1/18th share of the trust estate, when ascertained and ready for distribution, if she survived Mrs. Pratt, her mother, would approximate $1,400,000.

Brill's mother stopped her allowance in 1949 and she became destitute. She was referred to Samuel Cohen, described on his letterhead as the owner of "Allied Invest-

[1] The First National Bank of Chicago is joined as trustee thereof.

ment & Discount Corporation, in Philadelphia, Pa." Its business is trust estate financing and general financing. After making an assignment to Cohen of a $250,000 remainder interest, for which Cohen paid her $45,000, Brill made several similar assignments to Levy, including said MAR-B and MAR-C.

In this case Brill's counsel contends that Levy was guilty of fraud in procuring the execution of the assignments. The master did find fraud. However, we deem it unnecessary to decide whether fraud was proved. We note from the master's report that when the assignments were executed by her, in California, her attorney was present. The district court did not expressly find that fraud existed, although it approved the master's report and adopted its findings and conclusions.

1. In this case the district court has jurisdiction by virtue of the diversity of citizenship of the parties. *DeKorwin* v. *First National Bank of Chicago*, 7 Cir., 156 F. 2d 858, 861 (1946).

2. The validity and the nature of the two assignments in question are governed by the law where they were made. *DeKorwin* v. *First National Bank*, 7 Cir., 275 F. 2d 755, 760. That is California. In the courts of California the common law of England has been declared to be the rule of decision. *In re Elizalde's Estate*, 182 Cal. 427, 188 Pac. 560, 562 (1920).

3. The master in chancery held the assignments invalid as sales under the Uniform Sales Act in effect in California, but the district court expressly refrained from basing its decree on that act. We prefer to take the position that the assignments were made to secure a loan, as also held by the master and the district court.

Appendix A

Our position is supported by the fact that Levy required Brill to furnish him with insurance upon her life. The insurance requirement by Levy on the life of Brill is substantially relevant to the test of whether the transaction was a loan or a sale. As was said in *Provident Life & Trust Co.* v. *Fletcher*, S. D. New York (1916), 237 Fed. 104, 108, by Judge Learned Hand:

> "• • • the first question of law which arises is whether the transaction, without the security of any life insurance policies, was usurious. • • • The general test is whether the principal is put at any genuine hazard. • • • under all the possible circumstances, the principal must be repaid."

At 109, he added,

> "• • • • In all these cases, either in one way or another, the payment of principal was secured beyond any but colorable hazard."

This case was affirmed in 2 Cir., 258 Fed. 583 (1919). See also *DeKoruin* v. *First National Bank*, *supra*, 761.

In citing both *Provident Life* and *DeKoruin*, we are referring to the common law as announced by New York courts.

Levy advanced $75,000 to her in return for assurance that he would collect $350,000 in the future, the actual date being dependent upon the length of life of the life tenant, Mrs. Pratt, who was seventy-two years old when Levy advanced the money in December, 1949. We thus see that Levy advanced Brill money, and Brill, using her remainder interest in the Otto Young Trust, undertook to secure for him a refund in kind, and, to guard against her own death before

that of her mother, Levy required her to furnish him adequate life insurance at her own expense.[2]

We have carefully examined the evidence in the record and find that it proves clearly that Levy, before he would enter into the transactions in question with Brill, insisted that she at her expense make this provision to protect him against the possible termination of her remainder interest by her death prior to that of her mother. Thus, he not only used the cost of the insurance in reducing the amount which he paid her for the assignments, but she was prevailed upon to make an initial payment of $2,000 as premium on the insurance.

The facts unerringly point to the conclusion that this transaction is a loan.

Respondents in their brief admit that, under California law, the determination of whether a transaction is a sale or a loan follows the same principle as we announced in *In re Oakes*, 267 F. 2d 516 (1959), where we said, at 518:

> "* * * If it is a sale, we are not concerned with the question of interest, and if it is a loan then we are required to determine whether the interest charged is usurious."

Respondents have cited several California decisions, only one of which involves facts having any similarity to those in the case at bar. It is *Martyn* v. *Leslie*, 137 Cal. App. 2d 41, 290 P. 2d 58 (1955). We shall not encumber this opinion with a recital of the complicated transactions involved in

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[2] The assignee of Brill's brother, Graveraet Young Kaufman, in a similar transaction with assignee Rosen, in New York City, was more fortunate in his dealing because he avoided paying the premium on the insurance taken out on his life for the benefit of Rosen. *DeKorain* v. *First National Bank*, *supra*.

that case. Suffice it to say that no agreement to procure life insurance or any other kind of insurance was there involved. The word "insured" crept into the opinion, at 66, where the court said:

> "It is true that by means of the 'United Purchase Agreement' defendants insured themselves not only against loss, but of a profit. *However, they did not thereby exact any payment from the plaintiffs.* The plaintiffs were under no obligation to exercise their option, and there was no evidence that they were in any wise obligated to reimburse King or United if they purchased the 15 per cent interest. The evidence is all to the contrary." (Italics supplied.)

By way of contrast, in the case at bar the record is replete with evidence, including exhibits, answers of Levy to interrogatories, and his own testimony, as well as that of Brill, that the insurance on Brill's life, at her expense, *was exacted by Levy*, without which the transaction involving the assignments would not have been consummated by Levy. *Martyn* v. *Leslie* is not inconsistent with the result which we reach in this case.

4. Respondents point out that the maximum interest rate allowed by law in Illinois is 7%, Ill. Rev. Stat. ch. 74, §§ 4, 6, 8 (1961), while in California it is 10%, West's Cal. Const., Art. 20, § 22. They then contend that, inasmuch as the assignments were executed in California, which described Brill as "of Santa Monica, California" and that the corpus of the trust and the place of its administration are in Illinois, the resolution of the claim of usury requires a preliminary determination as to the applicable conflict of laws principles of the forum state, Illinois.

Brill agrees that the conflicts rule of Illinois controls.

Appendix A

In *George* v. *Haas*, 311 Ill. 382, plaintiff, George, sued in the municipal court of Chicago for the balance due on a promissory note which drew interest at 10%. Defendant Haas contended that no interest could be recovered because the rate of interest provided for was usurious. From a judgment for both principal and interest defendant appealed and the Appellate Court reversed. On further appeal, the Illinois Supreme Court stated, at 385:

> "* * * If a contract is executed in one State, to be performed in another State or country, the law of the place where the contract is to be performed will determine its validity and the nature and extent of the obligation. If a contract is made in one State, to be performed in another, and the States are governed by different laws, the law of the place where the contract is to be performed will prevail over the law where the contract was entered into and it will be enforced under the law of the place of performance. Parties are presumed to contract with reference to the law of the State where their contract is to be performed, and to be governed by such law rather than the law of the State where the contract was entered into. This rule has been declared and applied in practically every variety of contract, including bills of exchange, promissory notes, and checks drawn in another State, payable in this. * * *"

While respondents rely on *Walker* v. *Lovitt*, 250 Ill. 543, and *Oakes* v. *Chicago Firebrick Co.*, 388 Ill. 474, we believe that the reliance is not well-founded. In *Walker*, the court, at 546, applied the principle that when a contract for the payment of money is silent on the subject, the place of payment is presumed to be the place of making. Subsequently the same court in *Oakes* explained *Walker*, at 477:

> "* * * In the later case of *Walker* v. *Lovitt*, 250 Ill. 543, it was as definitely stated that the rule is well

settled that the validity, construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed. Clearly, that rule was applicable in that case because the note involved was executed and, by presumption, was payable in the same State. *No question of conflict of laws could, therefore, be directly involved.*" (Italics supplied.)

In *Oakes*, the court approved and followed its holding in the *George* case, *supra*.

We hold that the Illinois law on usury applies in this case.

5. By its final decree of September 26, 1962, the district court ordered that respondents, having received the sum of 42½¢ of each dollar in the face amount of their subassignments, were not entitled to any further payments out of Brill's share in the Otto Young Trust Estate, "the amounts these subassignees have received being sufficient fully to satisfy any and all valid claims by them arising from the assignments of December 29, 1949, and their subassignments thereunder. These subassignees' claims to additional sums or amounts based on the specified assignments and subassignments are without merit and are denied, and they are dismissed for want of equity."

An order of March 10, 1961, reflecting a partial settlement agreement between respondents and Brill, provided for the payment to each respondent, out of a deposit held by the court clerk, of a sum equal to 42½% of the *principal* amount of each respondent's claim, without prejudice to the rights of either party. Levy testified that a price of approximately 44¢ on the dollar for a share in the assignments in question was a fair price for subassignees to pay in January 1950 (when the subassignments were made by Levy). Respondents in their brief recognize this testimony

and do not dispute it. The inference that they paid such an amount is irresistible.

We are satisfied, therefore, that, from substantial evidence in the record, together with the reasonable inferences to be drawn therefrom, the 42½¢ referred to in the district court's final decree finds almost precise support in the evidence and that the slight, apparent variance in amount does not justify our disturbing the decree upon that ground alone.

For these reasons, the decree from which this appeal has been taken is affirmed.

DECREE AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B
JUDGMENT BELOW

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

No. 13992
Thursday, June 6, 1963
Before
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

MARGARET DEKORWIN, *etc.*,
Plaintiff,
v.
THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Defendants

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee, etc.,
Petitioner,
v.
MARIE LOUISE BRILL,
Respondent-Appellee,
and
FRANK BLOCH, et al.,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decree of the said District Court entered September 26, 1962, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

ILLINOIS REVISED STATUTES (1961), *Chapter 74, Paragraphs 4, 6, and 8 (Volume 2, pp. 580-81):*

* * *

§ 4. In all written contracts it shall be lawful for the parties to stipulate or agree that 7% per annum, or any less sum of interest, shall be taken and paid upon every $100 of money loaned or in any manner due and owing from any person to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided; Provided, however, with respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same, and provided further that in any case hereafter in which advances of money, repayable on demand, to an amount not less than $5,000, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, if evidenced by a writing, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon by the parties to such transaction, and provided further that it shall also be lawful to receive or to contract to receive and collect interest as permitted by Section 4a of this Act.

* * *

§ 6. If any person or corporation in this State shall contract to receive, except from a corporation and except with respect to advances of money repayable on demand,

to an amount not less than $5,000, made and secured as provided in Section 4 of this Act and except, also, as permitted by Section 4a of this Act, a greater rate of interest or discount than 7% upon any contract, verbal or written, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation, and all contracts executed after this Act shall take effect, except contracts for advances of money repayable on demand, to an amount not less than $5,000, made and secured as provided in Section 4 of this Act, and except contracts in which a corporation shall be the obligor, and except, also, contracts permitted by Section 4a of this Act, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable.

* * *

8. When any written contract, wherever payable, shall be made in this state, or between citizens or corporations of this state, or a citizen or a corporation of this state and a citizen or corporation of any other state, territory or country (or shall be secured by mortgage or trust deed on lands in this state), such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons or corporations in this state, or which is or which may be allowed by law on any contract for money due or owing in this state; provided, however, that such rate of interest shall not exceed 7% per annum, except where a corporation shall be the obligor and except, also, in the case of advances of money repayable on demand, to an amount not less than $5,000, made and secured as provided in Section 4 of this Act, and except, also, as permitted by Section 4a of this Act. And if any such person or corpo-

ration shall contract to receive a greater rate of interest or discount than 7% upon any such contract (except from a corporation) and except contracts for advances of money repayable on demand, to an amount not less than $5,000, made and secured as provided in Section 4 of this Act, and except, also, contracts permitted by Section 4a of this Act, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation.

* * *

CALIFORNIA CONSTITUTION, *Article 20, Section 22 (Volume 3, West's California Codes, 1954 ed. with 1962 pocket part, p. 670):*

Sec. 22. The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 434

FRANK BLOCH, ET AL.,

Petitioners,

vs.

MARIE LOUISE BRILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the Petition for a Writ of Certiorari on the following grounds:

First, the questions raised have significance only with respect to a small remaining portion of this litigation, since the great majority of the claimants, holding over eighty per cent of the dollar amount of claims, participated in settlements approved by the District Court.

Second, the questions are dependent upon facts peculiar to this litigation; it is not at all likely that a comparable set of facts will arise again in a context in which the same possible issues of California and Illinois law are involved. Moreover, the questions are not of general importance.

Third, from the Petition itself it is clear that there is no conflict between the decision below and the state authorities referred to by Petitioners. Realistically, there is a virtual absence of precedent in either California or Illi-

nois; New York is the only state in which there have been any higher court decisions with respect to the validity of assignments of remainder interests under circumstances similar to those involved here.

QUESTIONS PRESENTED.

1. With regard to Question No. 1, Respondent would note only that the decision below does not hold that a transaction such as that described "must be treated as a usurious loan." The decision reaches that result, but only after consideration of the entire record (Pet. Cert. App. A, p. 14).

2. With regard to Question No. 2, for reasons urged under Point II of the argument (pp. 9-10 *infra*), Respondent believes that the result would not be affected by applying the California, instead of the Illinois, maximum permitted rate of interest.

STATEMENT OF THE CASE.

The present Petition is the most recent of five attempts to bring portions of the *de Korwin* litigation to this Court. Since the original proceeding was filed in 1943, to construe the will of Otto Young and for an accounting, the cause has been before the Court of Appeals for the Seventh Circuit on six occasions. *De Korwin* v. *First National Bank of Chicago, etc., et al.*, 156 F. 2d 858 (1946), cert. den. sub nom. *First National Bank of Chicago* v. *de Korwin*, 329 U. S. 795 (1946); 179 F. 2d 347 (1949), cert. den. sub nom. *Pratt* v. *de Korwin*, 339 U. S. 982 (1950); 235 F. 2d 156 (1956); 267 F. 2d 337 (1959), cert. den. sub nom. *Berson* v. *Kaufman*, 361 U. S. 931 (1960); 275 F. 2d 755 (1960), cert. den. sub nom. *Jones* v. *Kaufman*, 364 U. S. 824 (1960).

The latest decision of the Court of Appeals, reported at 318 F. 2d 176 (C. A. 7th 1963) and reprinted as Ap-

pendix A of the Petition, is thus part of a long and complex case.

The litigation, however, is nearly over, and only peripheral issues remain. The principal undisposed-of matter has to do with a remnant of what were originally over $4,000,000 in assignments of dollar-amount portions of remainder interests under the trust estate created by Otto Young's will. Only a small fraction of this total still must be adjudicated or settled.

Respondent Marie Louise Brill, one of Otto Young's grandchildren, made assignments over a period of years to Leonard Levy and Samuel Cohen totalling $1,320,000; these were reassigned in varying amounts by the assignees to over one hundred thirty different subassignees. In December of 1960, the District Court approved an agreement in compromise between Mrs. Brill and holders of more than 80 per cent of the $1,320,000 in assignment claims, settling those claims for approximately 65 cents on the dollar. The unsettled claims are held by only eleven or twelve individuals, of whom eight are here Petitioners. In March of 1961, in order to pave the way for the implementation of the December 1960 settlement decree, the District Court authorized the payment to all but one of the non-settling claimants of 42½ cents on the dollar on the face amounts of their claims. Petitioners received such payments on account of their subassignments without prejudice to their rights to continue to litigate with respect to the balance (R. 57-61).

Viewed in light of the above background, the "Statement of the Case" in the Petition, taken together with the facts set out in the opinion of the Court of Appeals (Pet. Cert. App. A, pp. 10-18) and the statement of facts in the Report of the Master (R. 64-83), as supplemented by the Decree of the District Court (R. 99-103), is sufficient for purposes of presenting the issues.

ARGUMENT.

I.

THE LITIGANTS WHOSE CLAIMS REMAIN ARE FEW IN NUMBER, AND THE AMOUNTS THEY CLAIM ARE SMALL. FURTHERMORE, THE ISSUES DEPEND UPON A SPECIALIZED SET OF FACTS HAVING LITTLE GENERAL SIGNIFICANCE.

What is left of the assignment litigation is no more than a small scrap. Originally, approximately one hundred thirty claimants sought portions of Respondent Marie Louise Brill's remainder interest in the Otto Young Trust Estate. Of this number only eleven or twelve are left, including the eight Petitioners. The assignees originally sought $1,320,000, plus interest and attorneys' fees; the remaining claimants—all but one having received 42½ cents on the dollar on account—are pressing claims representing in face amount less than 12 per cent of that original total.

Moreover, the two particular assignments involved in this Petition—designated in these proceedings as MAR-B and MAR-C and having a face amount of $350,000—originally concerned approximately sixty subassignees, including the eight Petitioners. As the Petition discloses (Pet. p. 4), these eight remaining claimants claim $68,500; since they all received 42½ cents on the dollar on account, however, their actual claims total only $39,387.50.

A review by this Court of the legal issues urged by the eight Petitioners would probably not significantly affect anyone other than Respondent and Petitioners, and the claimed $39,387.50. The other claims—other than those presented in this Petition with respect to MAR-B and

MAR-C—have their origins in five separate assignments, namely, those designated as MAR-D, MAR-E, MAR-I, MAR-J, and MAR-K. MAR-I and MAR-J were assignments to another assignee, Samuel Cohen, and they grew out of a course of dealing between Marie Louise Brill and Samuel Cohen which commenced in mid-1949, prior to any assignments to Leonard Levy. MAR-E was executed in New York, not California. MAR-K involves a factual background markedly different from any of the others. And even MAR-D—probably the assignment most similar to MAR-B and MAR-C (the two assignments at issue in this Petition)—was entered into as a distinct and separate transaction six months after MAR-B and MAR-C.

Thus the questions which Petitioners seek to have this Court review may do no more than settle issues applicable to just the two assignments before the Court, namely, MAR-B and MAR-C. It probably would not materially facilitate resolution of the remaining issues in the litigation involving Respondent's other assignments.

In any event, the record discloses that many of the facts necessary to raise the issues urged by Petitioners are sufficiently peculiar to this case as virtually to preclude their recurrence. The facts which the Master, the District Court, and the Court of Appeals considered significant include the following: the nature of Respondent's interest—a vested remainder subject to being divested in the event that Respondent predeceased the life tenant, her mother, leaving issue her surviving; Respondent's age, that of her mother, and the ages of Respondent's three children; the wording of the assignment documents themselves; the sums of money received by Respondent for the assignments; the amount of insurance taken out by the original assignee, Leonard Levy, on connection with the assignments; the payment by Respondent of the initial premium on one of the

insurance policies; the written calculations by Leonard Levy showing how he arrived at the amounts he paid Respondent for the assignments; the subassignments made by Leonard Levy, and the amounts he received for those subassignments from the subassignees; the return anticipated by Leonard Levy, after taking into account what he paid, insurance costs, and interest, over the probable life expectancy of the life tenant.

Facts such as these affect only a handful of persons; a few remaindermen under long-lived testamentary trusts such as that of Otto Young, and a number of specialists, such as Leonard Levy, who advance money to heirs and remaindermen on assignments cast in the form of sales.

The present litigation is of interest to the litigants. Its importance beyond that narrow circle is slight.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE LAW OF CALIFORNIA OR OF ILLINOIS AS EXPRESSED IN THE DECISIONS OF THE HIGHEST COURTS OF THOSE STATES.

The sole ground for seeking review in this Court is the claim that "the Court of Appeals has decided an important question of state law in a way in conflict with applicable state law" (Pet. Cert. p. 5). As has been suggested under Point I above, the question of state law, while doubtless of significance to the litigants, has little if any general importance. Even assuming that there were conflict, the Petition does not present one of those "exceptional cases" appropriate for this Court's attention. Cf. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

A reading of the Petition, however, discloses that there is no conflict. Petitioners do not cite a single opinion of a California or Illinois appellate court involving the defense

of usury to the validity of assignments, cast in the form of sales, of dollar-amount portions of vested remainders which are subject to being divested in the event the remainderman predeceases the life tenant, where the hazard that the remainderman will die before the life tenant is eliminated by insurance on the life of the remainderman. The reason is simple: there are no such decisions. As far as appears after diligent research, the California and Illinois courts have not had occasion to pass upon the issue. The New York courts, by way of contrast, have dealt with the question at length, in many opinions, over a considerable span of years. The applicable New York authorities were exhaustively considered in an earlier portion of this litigation. *De Korwin* v. *First National Bank, et al.*, 170 F. Supp. 112 (D. C. Ill. 1958), aff'd 275 F. 2d 755 (C. A. 7th 1960), cert. den. sub nom. *Jones* v. *Kaufman*, 364 U. S. 824 (1960). That decision involved assignments made by Respondent's brother; as the Petition notes (Pet. Cert. p. 6), it turned on New York law, since the assignments were executed in New York.

What Petitioners object to, realistically, is that the Court of Appeals, finding nothing directly in point in California or Illinois, turned to the common-law principles as they had been developed in decisions of the New York courts. Having only recently had occasion to review the New York decisions in detail, in connection with Respondent's brother's assignments, the Court of Appeals noted the remarkable points of similarity between Respondent's assignment transactions and those of her brother, concluding that Respondent's assignments were also in actuality loans.

Of necessity, when a federal court is called upon to decide a question of state law and is unable to locate any pronouncements on the issue by the state courts, it must

exercise its own independent judgment. Cf. *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 236-38 (1943); *Damon & Jarvis Bldg. Corp.* v. *Mechanics' Ins. Co.*, 83 F. 2d 793, 794-95 (C. A. 7th 1936), cert. den. 299 U. S. 556 (1936); *Toomey* v. *Toomey*, 98 F. 2d 736, 739 (C. A. 7th 1938); *New York Life Ins. Co.* v. *Jackson*, 98 F. 2d 950, 952 (C. A. 7th 1938), cert. den. 305 U. S. 641 (1938).

Petitioners contend that in three particulars there is conflict with California law (Pet. Cert. pp. 7-8). Analysis of the points mentioned, however, indicates that the decision of the Court of Appeals does not contravene any California decision in any respect.

1. The Court of Appeals did not restrict the alienability of vested remainder interests. The effect of its decision is simply to prevent transactions said to be sales from being used as cloaks for loans whereby the party who advances funds secures for himself an exorbitant return. A bona fide sale of a remainder interest in California is not disturbed in the slightest. The contention that the Court of Appeals reached its decision in the teeth of *Sinclair* v. *Crabtree*, 211 Cal. 524, 296 Pac. 79 (1931), is untenable.

2. Despite Petitioners' arguments to the contrary, the illegal return was exacted from Respondent. Not only was the insurance on her life "exacted by Levy" at Respondent's expense, as the Court of Appeals noted (Pet Cert. App. A, p. 15), but the enormous return which Levy anticipated was clearly to come out of Mrs. Brill's share of the trust estate. The decisions cited by Petitioners to show that the Court of Appeals reached its result in face of contrary California law are not in point. *Refinance Corp.* v. *Northern Lumber Sales, Inc.*, 163 Cal. App. 2d 73, 329 P. 2d 109 (1958), involved a contract for factoring or purchasing receivables; the California court specifically held that the transaction was a real purchase, not a loan;

a determination which put an end to the defense of usury. In the present case, however, the Court of Appeals, affirming the District Court, concluded: "The facts unerringly point to the conclusion that this transaction is a loan" (Pet. Cert. App. A, p. 14).

The California decision principally relied on by Petitioners, *Martyn* v. *Leslie*, 137 Cal. App. 2d 41, 290 P. 2d 58 (1955), was considered by the Court of Appeals; in fact the Court noted that in *Martyn* v. *Leslie* "no agreement to procure life insurance or any other kind of insurance was there involved." It concluded that the *Martyn* decision "is not inconsistent with the result which we reach in this case" (Pet. Cert. App. A, p. 15). *Martyn* v. *Leslie* presented a complicated set of facts quite remote from those involved here. The excessive return there, if realized, would have come from third persons and not from the parties claiming to be borrowers. In the present case, Respondent's share in the trust estate was the intended source of Levy's excessive gain. Even the insurance costs were calculated as charges against Respondent's interest (R. 191-94), and the initial premium on one policy was paid by her. *Martyn* v. *Leslie* does not represent conflicting California law.

3. Petitioners' reliance upon *Schiff* v. *Pruitt*, 144 Cal. App. 493, 301 P. 2d 446 (1946), is equally misplaced. There the return, over and above the principal amount of the loan, depended upon what the court characterized as "matters of speculation", namely, the sales prices of unbuilt houses. In the present case, Levy's principal—the $75,000 he advanced to Mrs. Brill—and interest and insurance costs were fully protected by the $175,000 insurance on Mrs. Brill's life. Petitioners concede that at the Illinois maximum rate of interest of 7 per cent "the difference between the anticipated return and the net investment" would represent a return in excess of that maximum (Pet.

Cert. p. 6). They argue, however, that the Court of Appeals should have considered the 10 per cent rate permitted in California. The calculations employed to show that the result would have been different (Pet. Cert. p. 8) are misleading. Petitioners have taken gross insurance premiums per year; they make no allowance for cash surrender values, even though the record is clear that the policies on Mrs. Brill's life resulted in cash values (R. 383-383h). Furthermore, Petitioners ignore the fact that $2,000, the first year's premium on a $100,000 policy, was paid by Mrs. Brill, as the Court of Appeals observed (Pet. Cert. App. A, p. 14). Given the life expectancy of the life tenant as established in the record (R. 78), namely, 9.41 years, taking into account the initial insurance premium paid by Mrs. Brill, and allowing for cash surrender values, it is plain that even the 10 per cent interest permitted in California was not at hazard.*

4. The Court of Appeals did not fail "to follow the governing conflicts of law principles of Illinois" (Pet. Cert. p. 9). The Illinois cases cited by Petitioners, and particularly *George* v. *Haas*, 311 Ill. 382, 143 N. E. 54

* Ten per cent interest on $75,000 for 9.41 years amounts to $70,575; gross annual insurance premiums of $4,391.50 (R. 209-11) for nine years total $39,523.90, after deducting $2,000 initially paid by Respondent, the figure is $37,523.90. Thus the $75,000 advanced by Levy, interest for 9.41 years, and $37,523.90 in gross insurance premiums for which Levy was obligated total $183,098.90. But gross insurance costs must be reduced by cash surrender values, since the record shows that the insurance on Respondent provided for such values (R. 383-383h). Actuarial evidence as to the cash values of the policies (R. 301-02) makes it clear that net insurance costs would be less than half the gross premiums. The $175,000 insurance on Mrs. Brill's life was therefore more than sufficient to provide Levy with interest at the maximum 10 per cent permitted in California, even assuming Levy's claimed other out-of-pocket expenses of $2,780 (R. 193-95). Not only was Levy's principal secured, the maximum legal interest on that principal was secured as well.

(1924), fully support the conclusion of the Court of Appeals that the usury issue was governed by Illinois law. As a matter of fact, the Court of Appeals might have extended the applicability of Illinois law for the purpose of employing it in determining the nature of the assignment transactions. *Walker* v. *Lovitt*, 250 Ill. 543, 546, 95 N. E. 631, 632 (1911), relied on by Petitioners, simply holds that, when the instrument is silent as to place of payment, it "is presumed to be the place of making . . ." And *Reighley* v. *Continental Illinois Bank*, 390 Ill. 242, 247, 61 N. E. 2d 29, 32 (1945), does not stand for the proposition urged by Petitioners; that decision is entirely consistent with the general conflicts rule laid down in *George* v. *Haas*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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